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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-743

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP. and WILLIAM B. TROY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review two judgments herein of the United States Court of Appeals for the Fifth Circuit respectively reversing and remanding dismissal by the United States District Court for the Western District of Texas, before trial, of a portion of civil and criminal contempt petitions filed by the United States charging violations by petitioners of specified provisions of a final judgment in a Government civil antitrust action.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit, dated October 9, 1973, is not yet officially reported. It has been reported unofficially in 1973 Trade Cases ¶74,727. The opinion of the district court, dated and en-

15 U.S.C. 29, as amended (Expediting Act Section 2)

> In every civil action brought in any district court of the United States under . . . [the antitrust laws], wherein the United States is Complainant, an appeal from the final judgment will lie only to the Supreme Court.

Statement of the Case

The issues to which this petition is addressed stem from three separate legal proceedings in the same district court. These are:

1. A civil antitrust action instituted April 30, 1969 by the United States, against petitioners here, pursuant to 15 U.S.C. 4 alleging violation by petitioners of Section 1 of the Sherman Act (15 U.S.C. 1), which culminated in the entry of a final judgment, on consent of the parties, June 2, 1969 ("antitrust action").

2. A civil contempt proceeding instituted December 9, 1971 by the filing, in the antitrust action, of a civil contempt petition in which the United States charged petitioners here with violating enumerated provisions of the antitrust action final judgment.

3. An independent criminal contempt proceeding simultaneously instituted December 9, 1971, by the filing, supplemental to the antitrust action, of a criminal contempt petition in which the United States charged petitioners here with the same violations of the antitrust action final judgment.

The civil and criminal contempt petitions in these proceedings are virtually identical and differ only as to an additional allegation of wilfulness in the latter, and as to

the nature of the relief requested in the respective petitions. Both petitions charge petitioners here with the same violations of Section V(A)(1) and certain other provisions of the antitrust action final judgment.

Discovery in the Contempt Proceedings

At a hearing on February 10, 1972 the district court directed orally that full discovery in the separate civil and criminal contempt proceedings was to proceed simultaneously. At a hearing on March 29, 1972 that court directed that the criminal contempt charges would be tried separately from and before trial of the civil contempt charges, and announced that as part of their further criminal discovery the parties would engage in the voluntary omnibus pretrial program experimentally available in that district court.

Pursuant to discovery under these directions Government counsel made the following disclosures (beyond the bare petition charges) with respect to the substance and detail of its civil and criminal contempt cases:

1. Government counsel served and filed, in the civil contempt proceeding, thirty-one pages of answers to petitioners' written interrogatories and notice to produce documents under Rules 33 and 34 of the Federal Rules of Civil Procedure in which they outlined complete details of each factual incident the prosecution intended to prove under the charges of the civil contempt petition, named all persons in communication with Government counsel having knowledge of these incidents, and described each document in possession of and being produced by the prosecution relating to these incidents.

2. Government counsel served and filed in the criminal contempt proceeding (a) a twelve page voluntary bill of

particulars stating the details of each factual incident the prosecution intended to prove under the charges of the criminal contempt petition; and (b) a two page supplement to the voluntary bill of particulars stating the details of additional factual incidents the prosecution intended to prove under the criminal contempt petition charges.

3. Government counsel served and filed in the criminal contempt proceeding the prosecution's "First Submission" under the omnibus program which, among other things (a) identified each witness to be called by the prosecution in the criminal contempt trial; (b) outlined the substance of the testimony to be given by each such witness; (c) described and provided a copy of each item of documentary evidence to be introduced on trial by the prosecution in its case in chief and identified the witness through whom each such document was to be introduced; and (d) stated in substance all factual details and circumstances relating in any way to the criminal contempts of which petitioners here were accused. Under the Omnibus program Government counsel stipulated in writing that, except in unexpected circumstances it would not, at trial, attempt to offer, and would not offer, any additional documentary evidence or testimony in support of its criminal charges against petitioners here.

District court construction of the final judgment

On the basis of this full disclosure, petitioners here moved in the antitrust action for a ruling that the provisions of Section V(A)(1) of the final judgment do not prohibit any of the specific conduct embraced within the prosecution's civil and criminal contempt cases as those cases were fully and completely presented to the court beyond the bare allegations of the contempt petitions. In opposition to that motion Government counsel, in addition to extensive oral

argument, submitted the following written material incorporating further evidentiary and argumentative expositions of the prosecution's contempt cases:

1. The prosecution's six page "Opposition to Respondents' Application for Construction of the Final Judgment" with a seven page appendix describing the factual incidents constituting all of the alleged violations of Section V(A)(1) by petitioners here.

2. The prosecution's thirty-four page "Supplemental Memorandum in Opposition to Application to Construe Judgment" describing in detail the alleged conduct of petitioners here which the prosecution claimed to be violative of Section V(A)(1) and illustrating the manner in which the prosecution claimed that conduct violated this final judgment section. Exhibits A through D attached to this Supplemental Memorandum consisted of a letter, a written statement and two affidavits prepared by the prosecution's principal complainants detailing their respective versions of each of the factual incidents on which the prosecution based its Section V(A)(1) violation charges against petitioners here.

In considering this motion by petitioners here the district court expressly assumed the truth of all of the prosecution's proposed evidential showing of conduct alleged to be in violation of Section V(A)(1) [20a-21a][2], and ruled in the construction order that even if petitioners here had engaged in the activities charged, their conduct would not be violative of the prohibitions of that final judgment Section (27a).

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[2] Numbers preceding the suffix "a" refer to page numbers of the Appendix to this petition, infra.

Dismissal of the contempt petitions

Thereafter, on the basis of this construction order ruling, the district court entered:

1. Its June 12, 1972 dismissal order, jointly captioned in each of the separate contempt proceedings, dismissing, with prejudice, the paragraphs of each contempt petition charging petitioners here with Section V(A)(1) violations (28a-29a).

2. Its July 5, 1972 order, also jointly captioned in each of the separate contempt proceedings, dismissing, on Government application, without prejudice, the remaining charges of each contempt petition (see fn. 1, *supra*).

Prosecution's appeal notices

Government counsel duly filed a single notice of appeal to the Fifth Circuit, captioned jointly in the civil and the criminal contempt proceedings, seeking review of both the construction order and the dismissal order. Simultaneously, they filed an identical single notice of appeal to this Court which was thereafter duly dismissed by stipulation entered into at Government counsel's request.

The Fifth Circuit Opinion

1. Holding that dismissal of the criminal contempt petition did not constitute an acquittal bar to the criminal appeal, the Fifth Circuit opted, this time, to ignore substance and stand on formality. It ruled that petitioners here had not been put in jeopardy solely because full judicial consideration and acceptance of every detail of the prosecution's evidentiary case on the pre-trial dismissal motion was technically not a "hearing" of that same complete evidence on trial (7a-8a). The issue raised by this ruling is the substance of the first question presented by this certiorari petition.

2. The Fifth Circuit recognized throughout its opinion that the civil and criminal contempt petitions initiated separate proceedings which were subject to different appellate procedures. It affirmed that recognition with the entry of two separate judgments (30a and 32a). Admitting that, standing alone, an appeal from dismissal of the civil contempt petition would be beyond its jurisdiction because of the Expediting Act (3a) the Fifth Circuit held that it had jurisdiction to review that civil dismissal on the rationale of judicial economy found in cross-claim, pendant and ancillary jurisdiction (3a). The issue raised by this ruling is the substance of the second question presented by this certiorari petition.

3. Having decided that it had jurisdiction to entertain both the criminal and the civil appeals, the Fifth Circuit ignored the argument of petitioners here that when the prosecution withdrew its notice of appeal to this Court the district court's dismissal of the civil contempt petition became a final order which barred subsequent prosecution of the criminal appeal under the doctrine of collateral estoppel. This issue is the substance of the third question presented by this certiorari petition. It is moot if there is an affirmative determination by this court on the first question presented. It cannot be considered if there is an affirmative determination by this Court on the second question presented.

4. In reviewing the district court proceedings on appeal by the prosecution, the Fifth Circuit disagreed with that lower court's construction order and reversed and remanded on the ground that the conduct with which petitioners here are charged *could* constitute a violation of Section V(A)(1) of the antitrust action final judgment (2a). While petitioners here respectfully disagree, they do not feel that this issue is of sufficient general impor-

tance to warrant review by this Court. It is not raised in this certiorari petition.

5. The Fifth Circuit rejected the contention of petitioners here that the construction order was a "final judgment" in the antitrust action, within the meaning of the Expediting Act, which could not be reviewed by the court of appeals. That Court held, instead, that appraised in the circumstances under which it was made, the construction order realistically was only an integrated step in the contempt proceedings. Accordingly, the Fifth Circuit ruled that it could review the construction order under any review jurisdiction it might have in the latter proceedings (3a). In this instance the Fifth Circuit refused to permit the formalities of the district court construction order to override what it held to be the substance of that order. Again, while petitioners here respectfully disagree with this ruling, they do not feel that the issue involved is of sufficient general importance to warrant review by this Court. It is not raised in this certiorari petition.

Reasons for Granting the Writ

All three questions brought to this Court on this certiorari petition relate to the jurisdiction of the Fifth Circuit to entertain the criminal and civil appeals in this action. That court's opinion expressly admits that the appellate jurisdiction problem in this case "is difficult" (2a).

Each facet of the jurisdictional problem here is a matter of prime general importance and public interest on which there are now conflicting decisions among the circuits and between the opinion of the Fifth Circuit in this case and relevant pronouncements in opinions of this Court relating to important constitutional issues under the Fifth Amendment and to federal issues of substance relating to con-

struction of the Criminal Appeals Act and the Expediting Act as presently amended. Judicial economy and guidance for defendants in federal criminal cases with respect to summary disposition procedures require that these conflicts be authoritatively resolved. A grant of certiorari in this case would provide this Court with an opportunity to make that resolution on a clear and minimum record.

Acquittal and double jeopardy issue

Admittedly there was in this case the fullest possible pre-trial showing, *de hors* the criminal contempt petition, of every evidentiary fact and every item of proof in the prosecution's criminal case against petitioners here with respect to their alleged violations of Section V(A)(1) [7a]. Had the prosecution proceeded to trial it would have presented to the same judge exactly the same facts based on the same proof. Unquestionably if that judge had ruled at the close of the prosecution's case in chief that the facts so presented did not constitute a violation of Section V(A)(1) petitioners here would have been acquitted with full Fifth Amendment protection. *Green* v. *United States,* 355 U.S. 184, 188 (1957); *United States* v. *Sisson,* 399 U.S. 267, 289 (1970). This would have been so even if the court's construction of Section V(A)(1) had been erroneous. *Sisson, supra,* at 289. Petitioners here should be no less acquitted and no less constitutionally protected merely because the same judge made the same ruling on the same facts and proof before trial. Government counsel, in their brief to the Fifth Circuit characterized the district court's dismissal of the contempt petition charges under these circumstances and "with prejudice", as equivalent to a dismissal on summary judgment. The Fifth Circuit, in *United States* v. *Findley,* 439 F. 2d 970, 972 (1st Cir., 1971) made the same characterization of a pre-trial indictment dismissal

directed under similar circumstances. Notwithstanding growing judicial precedent for treating dismissal of criminal charges by way of pre-trial summary judgment equivalent to dismissal of such charges at any trial stage, the Fifth Circuit has ruled in this case that absent the ritual and technicality of the commencement of an actual trial pre-trial dismissals of criminal charges are appealable under Section 3731 as amended.

This is contrary, in effect, to the holdings of so-called "draft" cases recently decided in the First, Seventh and Ninth Circuits[3]. The Fifth Circuit found these decisions to be inapplicable to the double jeopardy issue in this case on the ground that they were decided solely on the basis of statutory constraints embodied in Section 3731, prior to its amendment in 1970 (8a) and not on the basis of the double jeopardy clause, admittedly also applicable to criminal appeals taken under that statute, pre-amendment *Green* v. *United States*, 355 U.S. 184, 188 (1957); *United States* v. *Sisson*, 399 U.S. 267, 289 (1970).

This broad characterization of the basis for decision in these draft cases is an over simplification.[4] In its own

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[3] *United States* v. *Findley*, 439 F. 2d 970 (1st Cir. 1971); *United States* v. *Ponto*, 454 F. 2d 657 (7th Cir. 1971); *United States* v. *Gustavson*, 454 F. 2d 677 (7th Cir. 1971); *United States* v. *Grochowski*, 454 F. 2d 655 (7th Cir. 1971); *United States* v. *Weller*, 466 F. 2d 1279 (9th Cir. 1972). Each of these cases involved a prosecution for refusal to submit to induction under the Military Selective Service Act of 1967, 50 U.S.C. App. §462(a).

[4] These is nothing in the Military Service Act which, for appellate purposes, distinguishes offenses thereunder from offenses under any other federal criminal statute, except that appeals from conviction under this Act are to be advanced for determination ahead of all other pending cases before the court [50 U.S.C. App. §462 (a)]. Draft cases lend themselves readily to summary disposition because they normally involve limited facts which can be determined without trial. Summary disposition is equally proper in more complex cases in which there is no factual issue to be tried. Cf. cases granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

opinion here the Fifth Circuit points out that the Seventh Circuit judges sitting *en banc* in *Ponto* and *Gustavson*, disagreed among themselves as to whether their lack of appellate jurisdiction over pre-trial dismissal of an indictment on the merits stemmed from constitutional or statutory grounds (9a-10a). Three Seventh Circuit judges in *Ponto*, and two in *Gustavson* expressly found that double jeopardy barred an appeal from such a dismissal. There is no indication in the reported opinions in *Grochowski* or in *Weller* to indicate whether the Seventh and Ninth Circuit judges respectively deciding those cases found their lack of jurisdiction over appeals from similar dismissals on the basis of constitutional grounds, on statutory grounds, or on both grounds.

Notwithstanding comment in the *Findley* opinion to the effect that the approach of the court there was in terms of "the kind of error Section 3731 was intended to cover" (439 F. 2d at 973), the First Circuit clearly recognized that jeopardy *does* attach to pre-trial dismissal based on judicial consideration of facts outside the indictment which would constitute a defense if presented at trial. The opinion makes the point that if it were otherwise defendants with irrefutable clear-cut defenses would be constrained, against the interests of all concerned, to avoid expediting procedures, and go to trial as their only path to double jeopardy protection, 439 F. 2d at 973-974.

The Fifth Circuit opinion makes no mention of the clear pronouncement of Mr. Chief Justice Burger in *United States* v. *Brewster*, 408 U.S. 501, 506 (1972), a non-draft case, to the effect that no appeal is available from pre-trial dismissal of criminal charges based on judicial consideration of evidentiary facts outside the indictment which would constitute a defense on the merits at trial. The Fifth Circuit opinion is likewise silent as to the decision

of the Sixth Circuit in *United States* v. *Kelsey-Hayes Co.*, 476 F. 2d 265 (6th Cir. 1973). *Kelsey-Hayes* is not a draft case. It involves a Government appeal from district court dismissal, like that here, of a criminal contempt petition charging violation of the final judgment in a Government civil antitrust action. Procedurally *Kelsey-Hayes* is on all fours with the case at bar except that here the evidentiary disclosures on which the district court's pre-trial dismissal was based are infinitely more clear and infinitely more complete. The Sixth Circuit concluded, on the facts there, and on authority of *Brewster*, that the dismissal order was not appealable. Nothing in the Sixth Circuit opinion indicates whether this conclusion was reached on constitutional or statutory grounds.

Concededly, all of the above cases were decided under the Criminal Appeals Act before its amendment became effective as of January 2, 1971. Since that date this statute permits appeals by the United States to the Circuit Courts of Appeal from all district courts orders dismissing criminal pleadings except where double jeopardy bars all further prosecution (18 U.S.C. 3731).

Petitioners have found two reported cases under the amended statute involving pre-trial dismissals like the dismissal in the case at bar. *United States* v. *Martinez*, 350 F. Supp. 971 (W.D. Pa., 1972) and *United States* v. *Rothfelder*, 474 F.2d 606 (6th Cir. 1973) cert. denied, 93 S.Ct. 3066. In *Martinez* the district court, citing *Ponto* and *Findley, supra*, expressly stated that upon pre-trial dismissal of a draft indictment jeopardy would attach. *Rothfelder*, citing *Sisson, Brewster, Findley, Ponto* and *Weller, supra*, and other authorities, held that no appeal is available under Section 3731, as amended, from pre-trial dismissal of a draft indictment based on the district court's examination of defendant's selective service file. That

examination revealed facts which would have constituted a defense at trial. Lack of appellate jurisdiction in *Rothfelder* is predicated *a fortiori* on double jeopardy.

In keeping with the recent observation of this Court that jeopardy is to be determined, in each case according to its facts (*Illinois* v. *Somerville*, 410 U.S. 458 (1973)) courts are finding that acquittal to which jeopardy attaches is no longer a rigid technical concept operative mechanically only in the framework of a criminal trial. A growing trend of judicial opinion recognizes that a defendant may be acquitted, with jeopardy protection, in pre-trial proceedings when a court determines, on the basis of evidence brought before it in any way, that the prosecution cannot prevail. The decision of the Fifth Circuit in this case is contrary to that trend. Because judicial opinion as to jeopardy under these circumstances is not unanimous in the circuits; because this Court has not decided any case involving this jeopardy issue under the amended Criminal Appeals Act; and because a decision by this Court is needed before defendants, in similar circumstances, will know whether they can safely utilize expediting procedures to save trial and appellate time and expense, not only for themselves, but for overburdened prosecutors and courts as well, petitioners respectfully believe that it would be in the public interest to grant this certiorari petition.

Issues of civil appeal jurisdiction

In the statutory scheme of appellate jurisdiction the Circuit Courts of Appeal have jurisdiction to review all final orders of the district courts in all civil matters *except* those orders which may be appealed directly to this Court (28 U.S.C. 1291). All final orders in antitrust actions brought by the United States must be appealed

and the Expediting Act. *Union Tool Co.* v. *Wilson* 259 U.S. 107 (1922) and *In re Merchants' Stock & Grain Co.*, 223 U.S. 639 (1912) involved orders issued in contempt proceedings between private parties for violation of injunctions issued in earlier actions between them. Fines imposed in each case were partly punitive and partly compensatory. The punitive portions of the orders were final. The remedial portions were interlocutory pending computation of total damages to be assessed. These cases, holding that finality as to the punitive fines permitted appellate review of the entire contempt order, are not precedents for joint review by the Fifth Circuit here of the civil and criminal appeals. *Union Tool* and *Merchants' Stock* did not involve orders in a Government antitrust case and no statutes like Section 1291 and the Expediting Act specifically barred such an ancillary extension of the jurisdiction of the Circuit Court of Appeals.

To summarize, no principle of judicial economy conferred upon the Fifth Circuit jurisdiction to review an order exclusively within the appellate jurisdiction of this Court under the Expediting Act. No principle of judicial economy conferred upon the Fifth Circuit appellate jurisdiction expressly withheld from that court by the statutory mandate of Section 1291. It is fallacious to view denial of a non-existent jurisdiction as imposing the impractical burden of reviewing substantially the same order in two different forums. Government counsel could have avoided any such judicial duplication by appealing, as they should have, from the civil contempt dismissal directly to this court under the Expediting Act. They could have simultaneously noticed an appeal from the criminal contempt dismissal to the Fifth Circuit under Section 3731, and stipulated for a continuance in that court until determina-

tion by this Court of the civil appeal. That determination would then control disposition of the criminal appeal issues. This would be the course, and the only course, of judicial economy. The fact that Government counsel misjudged their appellate options, to their detriment here, is no basis for recognizing an appellate jurisdiction which Congress has expressly withheld from the Court of Appeals. See *United States* v. *Munsingwear,* 340 U.S. 36 (1960).

There is a strong public need for this Court to eliminate one more area of judicial confusion in application of the principles of *Tidewater, supra,* raised by the Fifth Circuit ruling at bar. Cf. *International Business Machines Corporation* v. *United States,* 480 F. 2d 293 (2nd Cir., 1973).

Collateral Estoppel issue

The Fifth Circuit assumption of jurisdiction over the civil appeal was expressly predicated on its jurisdiction to entertain the criminal appeal (10a, 12a). If the criminal appeal is barred for any reason there will be no further jurisdictional basis for a continuance of the civil appeal (3a) and no need for consideration here of the collateral estoppel issue. If, instead, this Court should find there is no primary bar to the criminal appeal, *per se,* and hold with petitioners here that the Fifth Circuit had no ancillary jurisdiction over the civil appeal, we have a classic case for application of the doctrine of collateral estoppel. *Lawlor* v. *United States,* 349 U.S. 322, 326 (1955). Collateral estoppel is applicable in criminal cases even if a defendant has not achieved the protection of double jeopardy in a prior proceeding. *United States* v. *Oppenheimer,* 242 U.S. 85, 88; *Pena Cabanillas* v. *United States,* 394 F. 2d 785, 786 (9th Cir. 1968).

If, as petitioners here have claimed, *supra*, the sole avenue for review of the district court's order dismissing the civil contempt petition was a direct appeal to this Court under the Expediting Act, that district court order, and its decision on each issue embraced therein, have become final for all purposes. That finality attached when the Government withdrew, on stipulation, its notice of appeal to this Court, as aforesaid, and permitted the statutory time to expire without refiling that notice (28 U.S.C. 2101). The doctrine of collateral estoppel precludes relitigation in any second proceeding of any issue which has thus become final. *Angel* v. *Bullington*, 330 U.S. 183 (1947); *Grubb* v. *Public Utilities Commission*, 281 U.S. 470 (1930). Since each of the issues before the Fifth Circuit on the criminal appeal was identical with each of the issues decided with such finality in the district court order dismissing portions of the civil contempt petition, all review thereof by that court was barred under collateral estoppel principles. Under the circumstances the judgment of the Fifth Circuit on the criminal appeal was beyond its decisional power. *Sealfon* v. *United States*, 332 U.S. 575, 578 (1948); *Yates* v. *United States*, 354 U.S. 298, 335-336 (1957).

CONCLUSION

The decision of the Fifth Circuit at bar raises important questions concerning constitutional rights as well as criminal procedures, and appellate procedures under controlling federal criminal and civil statutes. Petitioners believe that the Fifth Circuit is in error in its rulings on these matters and in conflict with the views expressed by other courts of appeals and by this Court. Petitioners believe that it would be in the public interest to grant this petition.

Respectfully submitted,

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